No. 10084.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA CENTURY COMPANY, a California corporation, and RAYMOND LEWIS, doing business as Lewis Construction Company,

Appellants,

vs.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a national banking association,

Appellee.

APPELLANTS' CLOSING BRIEF.

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Point I.

There appears to be no question but that the proposition set forth by appellee in Point I of appellee's brief is a correct statement of the law and that such statement is applicable in this case. The cases therein cited bear out such a contention.

In the case of *Irving Trust Co. v. Fleming*, 73 Fed. Rep. (2d) 423, cited by the appellee, the facts are as follows: The receiver in bankruptcy brought an action

in the United States District Court to recover property, in which action the defendant appeared, thus giving said United States District Court jurisdiction by virtue of section 23b of the Bankruptcy Act. The plaintiff, receiver in bankruptcy, took possession of the property involved. Thereafter a creditor of the defendant commenced an action in the state court of West Virginia and said court seized the property. The question therein involved was whether a receiver in bankruptcy, having possession may be deprived thereof by officers of the state court. The answer obviously being that the United States District Court, once having legal possession had exclusive jurisdiction over said property. It should be pointed out that the United States District Court gained jurisdiction in this action under and by virtue of section 23b of the Bankruptcy Act which permits a receiver to commence an action against an adverse claimant in said court, however, the case should be distinguished from the one on appeal before this court in that this action was against the receiver or trustee in bankruptcy and therefore section 23a is applicable and said section 23a does not provide that the United States District Court may take jurisdiction over the action by the consent of the parties but only when the United States District Court would have had jurisdiction to maintain or to hear the action between the parties had there been no bankruptcy proceedings instituted. It is not contended by appellee that the United States District Court would have had jurisdiction to determine this action had it not been that the defendant Raymond Lewis doing business as Lewis Construction Company was adjudicated a bankrupt.

Point II.

There is some authority sustaining the position set forth as Point II by the appellee but said proposition carefully analyzed does not mean that the United States District Court had jurisdiction to maintain the present action. The first case cited by appellee, *Whitney v. Wenman,* 198 U. S. 539, decided in 1905, was an action by the trustee in bankruptcy commenced in the United States District Court sitting in bankruptcy or in other words, the Bankruptcy Court to recover property allegedly belonging to the bankrupt. It was held in said case that the Bankruptcy Court had jurisdiction under section 2, subdivision 7 of the Bankruptcy Act to maintain said action, the Bankruptcy Court having had constructive possession of said property. In using the term "District Court" in the quotation set forth by appellee the court was referring to the District Court sitting in bankruptcy and the holding therein was merely that the form of the pleadings filed in said District Court sitting in bankruptcy is not important. In said case the court cited *Bardes v. First National Bank,* 178 U. S. 524, 44 L. Ed. 1175, 20 Supreme Court Rep. 1000, which held that section 23b of the Bankruptcy Act prohibits suits commenced by the trustee in the United States District Court in the absence of consent by the defendant or the proposed defendant. The court also cited *White v. Schloerb,* 178 U. S. 542, 44 L. Ed. 1183, 20 Supreme Court Rep. 1007 which held that when property is seized from the Bankruptcy Court, the United States District Court sitting in bankruptcy had jurisdiction by summary process to compel its return. The court further held that the Bankruptcy Court has jurisdiction over all matters set forth in section 2 of the Bankruptcy Act and that there are certain exceptions provided in said act where the

trustee may maintain an action outside of the Bankruptcy Court and in those instances section 23b of the Bankruptcy Act prevails and "the District Court can, by the proposed defendant's consent, but not otherwise entertain jurisdiction over suits brought by trustees in bankruptcy against third persons . . ." It is only in actions brought by the trustee in bankruptcy that the United States District Court may take jurisdiction by consent of the defendant. In suits agaist the trustee in bankruptcy section 23a governs and said section does not provide that the United States District Court may take jurisdiction.

The case of *Whitney v. Wenman, supra,* definitely does not hold that the United States District Court may maintain an action brought by a trustee in bankruptcy for the sole reason that the Bankruptcy Court had possession of the property involved and in speaking of a plenary action being commenced by the trustee in bankruptcy said case refers to the form of pleadings filed in the Bankruptcy Court.

The case of *Rockmore v. New Jersey Fidelity and Plate Glass Ins. Co., et al.,* 65 Fed. Rep. (2d) 341, and the quotation therefrom set forth by appellee appears on its face to uphold the contention of the appellee. The facts of that case are as follows: The trustee in bankruptcy commenced a plenary action in the United States District Court concerning property neither in actual nor constructive possession of said trustee. The defendants objected to the jurisdiction of the court for the reason that there was no diversity of citizenship between the bankrupt

and the defendants which would confer jurisdiction on the United States District Court in the absence of consent thereto by the defendants. It was held that the trustee in bankruptcy not having possession of the property could neither maintain this action without the consent of the defendants either in the Bankruptcy Court or in the United States District Court. It necessarily follows that the proper place for said action to have been commenced was a state court having jurisdiction over the subject matter of the action. That part of the decision that the Bankruptcy Court may adjudicate conflicting rights to property in the actual or constructive possession of the trustee in a suit brought in the United States District Court was unnecessary to the decision in that the property in this case was neither in the actual nor constructive possession of the trustee. As an authority for such statement which was unnecessary in determining said case the court cited *Central Republic Bank & Trust Co. v. Caldwell*, 58 Fed. (2d) 721, which case held that the Bankruptcy Court always has jurisdiction, summary or plenary over property in the possession of the trustee in bankruptcy and then said case explains the difference between a summary and plenary proceedings. In brief, a summary proceedings is informal and a plenary proceedings is formal, therefore the *Central Republic Bank & Trust Co. v. Caldwell, supra,* in holding that the Bankruptcy Court had jurisdiction merely stated that the pleadings which must be filed in the Bankruptcy Court may be either summary or plenary and from that decision the court in *Rockmore v. New Jersey Fidelity & Plate Glass Ins. Co., supra,* decided by dicta that such plenary action may be brought in a court outside of bankruptcy or in other words the United States District Court.

This point is directly decided in the recent case of *Monroe v. Ordway,* 103 Fed. (2d) 813, wherein the court stated:

> "But if appellant means that the real estate was owned by and in the possession of the bankruptcy at the time the petition in bankruptcy was filed and at the time of the adjudication, a plenary suit in equity to cancel the sham deed was not the proper remedy; and the court did not err in dismissing the suit. The trustee, under such circumstances, has ample remedy under the Bankruptcy Act, 11 U. S. C. A., Sec. I, *et seq.*, by summary proceedings. *Taubel-Scott-Kitzmiller Co. v. Fox,* 264 U. S. 426, 44 Supreme Court 396, 68 L. Ed. 770."

Said action was a plenary suit commenced in the United States District Court by the trustee in bankruptcy and was properly dismissed by the United States District Judge.

Kendrick v. Watkins, 121 Fed. (2d) 287, holds as follows:

> "Inasmuch as we have concluded that possession was at all times had by the bankrupt, it follows that there was summary jurisdiction to pass upon the instant case. The Referee certainly had summary jurisdiction over the property in the constructive possession of the bankruptcy court and a plenary action was, thus, not necessary. Cf. Warder v. Brady, 4 Cir., 1940, 115 Fed. (2d) 89."

Appellants herein restate the proposition that the court of bankruptcy had exclusive jurisdiction in this case for the reason that the property was in the possession of said court and for the further reason that section 2, subdivision

7, provides that said court is to determine controversies in relation to property of the bankrupt. The only answer that appellee has to this contention is that the United States District Court and the department thereof which heard this case was the court of bankruptcy as provided in the Bankruptcy Act, thus obliviating any distinction between said courts. Such a contention is untenable under the cases cited. It is also contrary and repugnant to the provisions of the Bankruptcy Act itself. Section 1 thereof, subdivision 9, provides as follows:

> " 'Court' shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending;"

Chapter 2 of the Bankruptcy Act entitled "Courts of Bankruptcy" and section 2 thereof provides as follows:

> "CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION . . .
>
> a. The courts of the *United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby* invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at *law and in equity* as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to . . ."

and sections 23 and 24 of the Bankruptcy Act specifically limit and prescribe the jurisdiction over the United States and state courts. To hold that there is no distinction between the United States District Court and the United States District Court sitting in bankruptcy would render

the foregoing sections of the Bankruptcy Act a nullity, because according to appellee's contention the United States District Court as such would have jurisdiction to do anything and everything prescribed in the Bankruptcy Act that a court of bankruptcy could do.

It should further be pointed out that the position the appellee is now taking is being raised here for the first time. The pleadings, findings of fact and judgment filed in the United States District Court indicate that the action was intended as a separate and distinct action against the trustee in bankruptcy. Paragraph III of the complaint [Tr. of Record p. 3] sets forth the bankruptcy proceedings and the case number thereof and in paragraph X of said complaint [Tr. of Record p. 7] the appellee alleged that the referee in the bankruptcy proceedings made "his order permitting plaintiff to institute proceedings in the District Court of the United States, Southern District of California, Central Division . . ." In Finding III of the Findings of Fact and Conclusions of Law [Tr. of Record p. 19] the court found:

"III.

"That on or about April 29, 1940, an involuntary petition in bankruptcy was filed against the defendant, Raymond Lewis, doing business as Lewis Construction Company; *that said bankruptcy proceedings were at all times thereafter and are in the District Court of the United States, Southern District of California, Central Division, case No. 36226-C.*" (Italics ours.)

Besides being contrary to the Bankruptcy Act and inconsistent with the pleadings, findings of fact and the judgment, to interpret the law as appellee contends would

be to upset the established principle that the court having the custody of the property has exclusive jurisdiction over all matters in relation thereto. If the law were as appellee contends it should be, the United States District Court would constantly be interfering and dealing with property in the custody of the Bankruptcy Court. The two courts would have concurrent jurisdiction and both courts could try the same issues, disregarding the other, however, as the Bankruptcy Act now stands the Bankruptcy Court can restrain the United States District Court or any other court from proceeding in matters over which it has taken jurisdiction, which in itself would lead one to conclude that the United States District Court is not the court of bankruptcy as such.

Conclusion.

This was a case which should have been determined in the court of bankruptcy and if for any reason the court of bankruptcy had the power to allow said case to be decided in a court other than the court of bankruptcy then the case must be taken to the court that had jurisdiction over the subject matter of the action. The United States District Court did not have such jurisdiction and such jurisdiction could not be conferred upon said court by the acts and conduct of any of the parties herein.

Respectfully submitted,

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